APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 30, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-13293
Non-Argument Calendar

D. C. Docket No. 00-00661-CV-ORL-22D

MARVIN V. FRANDSEN, JAN L. FRANDSEN, et al.,

Plaintiffs-Appellants,

versus

BREVARD COUNTY, FLORIDA,
PHIL WILLIAMS, Brevard County Sheriff,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 30, 2003)

Before EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants, who are "naturists" who desire to engage in activities in the nude at Playalinda Beach,

in Brevard County Florida, brought this section 1983 action against Defendants-Appellees Brevard County and Sheriff Phil Williams, challenging the constitutionality of Brevard County's Anti-Nudity Ordinance. Plaintiffs sought declaratory and injunctive relief forbidding enforcement of the Ordinance and damages. In a lengthy and comprehensive opinion, the district court, concluding no genuine issue existed on the claimed constitutional violations, granted summary judgment in favor of Defendants. No reversible error has been shown; we affirm.

Brevard County Ordinance 95-21 (the "Ordinance") was enacted in May 1995 "to prohibit being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates." Ordinance, § 2. Extensive findings of fact are recited in support of the Ordinance. Exempted from the prohibition against public nudity is public nudity that may not be constitutionally prohibited. Ordinance §§ 6(b)and (c).[1]

Plaintiffs argue that the Ordinance is subject to strict scrutiny because it is a content-based law that regulates protected speech. The district court concluded to the contrary: the Ordinance regulates the conduct of public nudity; it is content neutral and, therefore, the intermediate scrutiny test

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1. Section 6(b) exempts public nudity that cannot constitutionally be prohibited because such nudity "is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message. . . ." Section 6(c) exempts public nudity that "cannot constitutionally be prohibited . . . because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions."

of *United States v. O'Brien*, 88 S.Ct. 1673 (1968), applies. We agree with the district court that (i) the Ordinance is a constitutional exercise of the County's police power; *see Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 644 (M.D.Fla. 1994), *affirmed* 66 F.3d 272 (11th Cir. 1995);[2] (ii) the Ordinance furthers important governmental interests in protecting order and morality; (iii) those governmental interests furthered are unrelated to the suppression of free expression; and (iv) the incidental restriction on First Amendment freedoms, if any, is no greater than required; the *O'Brien* test is satisfied. *See id.*

No constitutional right to sunbathe or associate in the nude exists. *See South Florida Free Beaches, Inc. v. City of Miami, Florida*, 734 F.2d 608, 610 (11th Cir. 1984). Plaintiffs contend that the district court mischaracterized their claims by stating that they want to demonstrate in the nude. Plaintiffs claim no right to demonstrate in the nude *per se*. Instead, they seek redress of their claimed First Amendment right to use expressive nudity in combination with other protected speech as a medium to convey political and religious messages. When the nudity conveys a message likely to be understood by those who view it, Plaintiffs argue such expressive nudity is protected. But, as the Supreme Court observed in *O'Brien*, 88 S.Ct. At 1678, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." And, even if we were to accept that Plaintiffs's proposed conduct -- public

2. Our order affirming the judgment of the district court in *Café 207* was "for the reasons stated in [the district court's] dispositive memorandum opinion."

nudity -- could be expressive and protected, the savings provisions of the Ordinance exempts expressive nudity that constitutionally may not be prohibited.[3]

Plaintiffs also challenge the Ordinance as facially invalid claiming the Ordinance is both vague and overbroad. About Plaintiffs's vagueness argument, the district court relied on our application in *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1329 (11th Cir. 2001), of the standard articulated in *United States v. Salerno*, 107 U.S. 2095 (1987), to conclude that Plaintiffs' facial challenge based on vagueness failed: Plaintiffs failed to carry the heavy burden of establishing that no set of circumstances exists under which the Ordinance would be constitutional; to the contrary, much activity could be prohibited validly under the Ordinance.

Plaintiffs nonetheless argue that the Ordinance is vague because it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and because it empowers law enforcement to engage in arbitrary and discriminatory enforcement. Plaintiffs focus especially on section 6(b)'s exemption from its sweep of nudity that is "necessary for" the conveyance of a message. But again as noted by the district court, this Court has rejected already a vagueness challenge to a virtually identical anti-nudity ordinance. *See Café 207*, 856 F.Supp. at 649-50. And, Plaintiffs focus especially on section 6(c)'s exemption of nudity otherwise protected by the United States or Florida constitutions or both "under existing judicial decisions." Again, as observed in *Café 207*, limitations of language that make it impractical or impossible to state with precision all

3. See footnote 1.

instances of protected public nudity do not render the exemption unconstitutionally vague.

No vagueness permeates the Ordinance; the Ordinance provides adequate notice about when nudity is proscribed. *See Horton v. City of Augustine*, 272 F.3d 1318, 1330-31 (11th Cir. 2001).

Plaintiffs's facial challenge based on overbreadth also is without merit. Again, as the district court noted, *Café 207*, 856 F.Supp. at 648, rejected a facial overbreadth challenge to a substantially similar ordinance. The general rule is that no facial challenge based on overbreadth may succeed unless the statute is shown to be unconstitutional in all its applications. *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2000); *see also United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000) (stating that "no set of circumstances" is the general rule for evaluating facial challenges in this circuit).

A limited exception to the "unconstitutional-in-every conceivable-application" rule has been suggested in cases raising a facial overbreadth challenge in the context of the First Amendment. *See, e.g., Horton*, 272 F.3d at 1331-32. As we observed in *Horton*, *id.*, this limited exception has application to prior restraints on speech; it allows challenge to permitting and licensing regulations not relevant here. And, even if the exception were to apply absent a prior restraint, it would apply only "when [a law] is 'substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases.'" *Horton*, 272 F.3d at 1332, *quoting Ward v. County of Orange*, 217 F.3d 1350, 1355 (11th

Cir. 2000). The Ordinance exempts from its sweep constitutionally protected expression; its application could impose no constitutional infringement "in a substantial proportion of cases." We see no error in the district court's conclusion that protected expression inhibited by the Ordinance -- if any -- can be remedied on a case-by-case basis.

We also see no merit in Plaintiffs equal protection and freedom of religion claims.[4] And, no infirmity in the findings supporting adoption of the Ordinance has been shown.

After reviewing all claims advanced by Plaintiffs, we see no reversible error in the district court's grant of summary judgment in favor of Brevard County and Sheriff Phil Williams.

AFFIRMED.

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4. Plaintiffs claim an equal protection violation based on the Sheriff's enforcement of the Ordinance against naturists appearing nude on public beaches but not enforcing the Ordinance against adult entertainers appearing in adult entertainment establishments. A separate ordinance governs adult entertainment venues. No equal protection violation has been shown in this dual regulatory structure. About Plaintiffs freedom of religion claims, we reject facial invalidity based on the Ordinance's failure to except from its scope nudity engaged in in the course of religious meetings or ceremonies. And, even if a case-by-case adjudication could support an as-applied challenge, the Ordinance itself exempts from its scope constitutionally protected activity.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED MAY 3, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:00-cv-661-Orl-22DAB

MARVIN V. FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, AND TONIANNE WYNER,

Plaintiffs,

-vs-

BREVARD COUNTY, FLORIDA, and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Defendants.

ORDER

I. INTRODUCTION

Plaintiffs are "naturists"[1] who desire to engage in nude sunbathing and other nude activities at Playalinda Beach,

1. "A naturist is a person who 'advocates a "clothing optional" lifestyle.'" *United States v. Frandsen*, 212 F.3d 1231, 1234 n.1 (11th Cir. 2000) (quoting *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1517 (11th Cir.1992)).

located within the Canaveral National Seashore in Brevard County, Florida. Their ability to do so has been frustrated by Brevard County's enactment of an ordinance banning public nudity. This prompted Plaintiffs to conduct nude protests of the ordinance at Playalinda Beach. They also planned to perform a play at Playalinda involving nudity, written by Plaintiff Tonianne Wyner, but claim they were afraid to actually proceed with the performance for fear of arrest. The Sheriff of Brevard County, Phil Williams, has enforced the ordinance by arresting nudists at Playalinda, including some of the named Plaintiffs.

By means of this suit, the Plaintiffs sue Brevard County and the Sheriff pursuant to 42 U.S.C. § 1983. Plaintiffs contend the anti-nudity ordinance is unconstitutional; more specifically, they assert that it impermissibly infringes on their First Amendment rights of free expression and religious exercise, and is both vague and overbroad. Additionally, Plaintiffs claim the Sheriff has denied them equal protection by enforcing the ordinance against naturists while ignoring nude performers in adult entertainment establishments.

The parties have filed cross-motions for summary judgment. Upon considering the parties' extensive submissions, the Court determines that the Defendants are entitled to summary judgment on all of the Plaintiffs' claims.

II. THE ORDINANCE

Brevard County Ordinance 95-21, entitled "Brevard County Public Nudity Ordinance," was enacted in May 1995. It provides as follows:

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Section 2. *Intent.* It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Section 3. *Findings.*

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So. 2d 1155, 1156, n.3 [Fla. 1977]; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was

considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area # 13), which has historically been frequented by nude sunbathers, and

e. efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of

complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches v. City of Miami]; and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart [sic] for nudity has been found, by other communities in Florida, to have generally increased incidents of prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

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l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

m. Brevard County is a family-oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular Playalinda Beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude to nonpublic places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the [sic] Brevard

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County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v. Glen Theatre[,] Inc. 111 S.Ct 2456, 115 L.Ed.2d 504 [1991]); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. *Definitions.*

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose,

1) the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-strings, T-back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not

completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) years of age.

d. "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended for sleeping accommodations; or at the enclosed or isolated location of a bona fide private club whose membership as

a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover

charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. *Public nudity.* Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or

b. cause or permit another person to appear nude in a public place; or

c. sunbathe nude in a public place; or

d. appear nude in a public place in such a manner as to be in violation of § 877.03, Florida Statutes; or

e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by § 775.01, Florida Statutes.

Section 6. *Exemptions.* The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:

a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal

function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc., __ U.S., 111 S.Ct. 2456,115 L.Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So.2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or

d. where a person appears nude in any area which has been designated, by the Federal or State government as a public place provided or set apart for nudity;

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. *Violation of Section 5/Penalty.* Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500.00 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1)[,] Florida Statutes.

Section 8. *Severability.* If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate [the] purpose and intent of this ordinance.

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> Section 9. *Area Embraced.* This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Exhibit "A" to Doc. 57.

III. BACKGROUND[2]

Plaintiffs Dr. Marvin V. Frandsen, Jan L. Frandsen, Frank J. Cervasio, Marianne Cervasio and Bryan Morris are officers and/or members of an organization known as Central Florida Naturists, Inc. ("CFN"). They and Plaintiff Dian Hardison reside either in Brevard County or neighboring Orange County. Plaintiff Tonianne Wyner is a resident of St. Lucie County, Florida. She has written, directed and produced plays with naturist themes involving nudity.

This suit is merely one skirmish in the Plaintiffs' long-running battle with various government entities concerning the regulation of nudity, and protests against such regulation, at Playalinda Beach and other public recreation areas. *See United States v. Frandsen*, 212 F.3d 1231 (11th Cir. 2000); *Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. 5th DCA 2001); *DeWald v. Wyner*, 674 So.2d 836 (Fla. 4th DCA 1996); *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992). Confronted by the legal obstacle that there is no constitutional right to sunbathe or associate in the nude, *see South Florida Free Beaches, Inc. v. City of Miami, Fla.*, 734 F.2d 608, 610 (11th Cir. 1984), Plaintiffs

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2. Some of the facts set forth herein are derived from the admitted facts section of the parties' Joint Pretrial Statement. *See* Doc. 121, § IX, at 20-24.

have attempted to "dress up" their otherwise unprotected conduct in the clothing of the First Amendment for the purpose of mounting a constitutional challenge to Brevard County's anti-nudity ordinance.

Frandsen, Morris and the Cervasios were arrested in 1995 and 1996 for violating Brevard County's anti-nudity ordinance while conducting demonstrations against the ordinance at the Canaveral National Seashore. It is undisputed that these Plaintiffs were nude at the time of their arrests. It is not necessary for present purposes to recount all of the details of these protests and arrests. In summary, the demonstrators displayed protest signs bearing such statements as: "TODAY'S BLUE LIGHT SPECIAL — CLOTHES HALF OFF," "IF GOD WANTED US NUDE, WE WOULD BE BORN THAT WAY," "CANAVERAL NATIONAL SEASHORE, UNDER NEW MANAGEMENT BY BREVARD CO. COMMISSION," "ANTI-BIGOTRY THE COUNTY COMMISSION'S NEW CLOTHES," "PROTEST THE MANDATORY TAN LINES ORDINANCE," and "BSO HAS TO GO!"[3] Some demonstrators wore hats and wrist/ankle bands displaying protest language and/or symbols. Finally, some of the protesters made speeches concerning the ordinance and its enforcement. It is clear that the words spoken, and written messages exhibited, by the protesters constituted expression traditionally entitled to First Amendment free speech protection.

In 1996, CFN invited Plaintiff Wyner to write and produce a play about Playalinda Beach. In response, Wyner

3. BSO is a reference to the Brevard County Sheriff's Office.

created a work entitled "Playalinda, The Play and The Beach". According to Plaintiffs, the play contained nude scenes of historical significance regarding the aboriginal inhabitants of Playalinda Beach. Plaintiffs further assert that the play was scheduled to be performed at Playalinda during 1996, but was cancelled due to fears of arrest under the ordinance. Plaintiffs also maintain that a separate play written by Wyner and intended to be performed during 1996 at a former-adult entertainment establishment in Brevard County was cancelled for the same reason.

IV. SUMMARY JUDGMENT STANDARDS

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.'" *Cohen v. United American Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting *Cox v. Administrator U. S. Steel & Carnegie*, 17 F.3d 1386, 1396, *modified on other grounds*, 30 F.3d 1347 (11th Cir.1994), *cert. denied*, 513 U.S. 1110 (1995)). "There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." *Cohen*, 83 F.3d at 1349. The Court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party.

See Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993), *reh'g and reh'g en banc denied*, 16 F.3d 1233 (11th Cir. 1994).

V. ANALYSIS

A. Freedom of Expression

At the outset, the Court rejects Plaintiffs' suggestion that nudity is a necessary component of their demonstration against the ordinance, i.e., that their messages of protest cannot be conveyed unless they are nude.[4] As Defendants note, to accept this position is to essentially embrace the proposition that the Plaintiffs have a right to break a law in order to protest it. Plaintiffs have no more right to appear nude while protesting the ordinance than any person would have to smoke marijuana or ingest cocaine while demonstrating against laws banning the illegal use of controlled substances.[5] Plaintiffs remain free to protest against Brevard County's public nudity ordinance, but not while completely nude.[6]

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4. Ironically, a contrary ruling would deal an equally serious blow to Plaintiffs' free speech challenge to the ordinance. In other words, if the nudity exhibited by the protesters *was* protected expression, then it would fall within the exemptions set forth in § 6.b & c., thereby strengthening the Defendants' argument that the ordinance is constitutional under the First Amendment.

5. Because the Plaintiffs who were arrested at Playalinda in 1995 and 1996 were undisputedly nude, and their protest activities did not transform their nudity into protected expression, the Sheriff's deputies had probable cause to arrest them for violating the ordinance.

6. To support their argument that nudity is protected expression when combined with protest, Plaintiffs advert to the following

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The Court also rejects Plaintiffs' argument that Brevard County's anti-nudity ordinance is subject to strict scrutiny because it is a "thinly disguised law that regulates speech." Doc. 75, ¶ 3, at 1. To the contrary, the ordinance regulates the conduct of public nudity, not speech. It is content-neutral, and even contains exceptions designed to preserve constitutionally-protected expression, like a substantially similar ordinance banning public nudity in Orange County. *See Gatena v. County of Orange*, 80 F. Supp. 2d 1331 (M.D. Fla. 1999), *aff'd*, 226 F. 3d 649 (1 lth Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001). Accordingly, the ordinance must be analyzed under the intermediate-scrutiny test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968). *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991); *Gatena*, 80 F. Supp. 2d at 1335-41; *Café 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 643-46 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996). Under the *O'Brien* standard, "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial

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language in *South Florida Free Beaches, Inc. v. City of Miami, Fla*: "[n]udity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection." 734 F.2d at 610. Plaintiffs make too much of this language. *South Florida Free Beaches* does not say nudity is *always* protected when combined with protected expression, it merely indicates that nudity *cannot* be protected *unless* so combined. If the language were as broad as Plaintiffs suggest, Plaintiffs would be able to insulate themselves from prosecution under the ordinance merely by donning a ball cap bearing the American flag or discussing politics with a passerby while appearing naked in public. This Court cannot accept such an absurd construction of the First Amendment.

governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. Each of these factors will be separately addressed.

1. Whether the ordinance is within Brevard County's constitutional power.

Section 2 of the ordinance expressly states that the Board's intent in enacting the measure is to protect societal order and morality, and to protect and preserve the health, safety and welfare of Brevard County's citizens. Unquestionably, regulation of these matters is within Brevard County's traditional police power to provide for the public health, safety, and morals. *See Gatena*, 80 F. Supp. 2d at 1339; *Café 207*, 856 F. Supp. at 644. Accordingly, the ordinance satisfies the first *O'Brien* prong.

2. Whether the ordinance furthers an important or substantial governmental interest.

The ordinance furthers the important and substantial governmental interests of protecting public order and morality, and in combating the negative secondary effects of public nudity. *See Gatena*, 80 F. Supp. 2d at 1339-40; *Café 207*, 856 F. Supp. at 644: The ordinance is replete with findings concerning these negative secondary effects. Plaintiffs expend considerable energy in attempting to controvert these and other findings. However, as Judge William Terrell Hodges noted in *Café 207*, "[e]vidence about

secondary effects or, rather, the lack of them, is . . . clearly foreclosed." 856 F. Supp. at 645. Even if such an inquiry were permitted, all that is required is that the government entity have "some factual basis" for its conclusions concerning secondary effects. *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Ga.*, 242 F.3d 976, 985, *reh'g and reh'g en banc denied*, 254 F.3d 77 (11th Cir. 2001), *pet. for cert. filed*, 70 USLW 3091 (July 23, 2001) (No. 01144).[7]

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7. *Flanigan's Enterprises* suggests that the government entity's reliance on evidence concerning secondary effects must also be reasonable. *See* 242 F.3d at 987. However, a careful reading of the opinion suggests that this requirement may be limited to measures banning nude dancing in establishments licensed to sell liquor, and does not apply to ordinances banning all public nudity. In that regard, *Flanigan's Enterprises* states:

> We realize that our decision today appears to result in constitutional fact finding, in which the constitutionality of an ordinance will depend on local conditions. However, we have no choice; we are bound by the decisions of the Supreme Court and the law of our circuit. *To be sure, Defendants may respond by enacting a ban on all public nudity; the Supreme Court has upheld that. See* [*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)]; *see also* [*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)]. However, Defendants may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects.

242 F.3d at 986-87 (emphasis supplied). *Flanigan*'s is also distinguishable on the basis that in that case "the county's own studies negated the very interests it purportedly sought to prevent." *Id.* at 986.

(Cont'd)

In the instant case, the minutes of the Board of Commissioners' meetings and other evidence considered by the Board (such as police reports, citizen complaints, and findings of other Florida communities) constitute, as a matter of law, a sufficient factual basis for the Board's findings, including those pertaining to negative secondary effects. Finally, even if some of the findings set forth in the ordinance are erroneous (e.g., whether public nudity is subject to general disapproval by the county's residents), the severability provision in § 8 saves the ordinance. Accordingly, the ordinance satisfies the second *O'Brien* requirement.

3. Whether the County's interest in prohibiting public nudity is unrelated to the suppression of free expression.

The following language from *Gatena* is instructive on this point:

> Under *O'Brien's* third prong, the County's interest in prohibiting public nudity is unrelated to the suppression of free expression. Contrary to Gatena's argument, the purpose of the Ordinance

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(Cont'd)

Accordingly, the Eleventh Circuit concluded: "We simply cannot find it reasonable for a government entity to conduct studies on specific areas and then to reject the conclusions thereof in favor of studies from different cities and different time periods." *Id.* at 987. This circumstance is not present in the instant case. In any event, even if the additional element of reasonable reliance applies to this case, no reasonable jury could find from the evidence presented that the Board's reliance on the matters it considered was unreasonable *at the time the ordinance was enacted.*

is to control the adverse effects of public nudity, not expressive activity. The *Barnes* Court found a similar public indecency statute to be unrelated to suppression of free expression, stating that

> [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at the beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

Barnes, 501 U.S. at 571, 111 S.Ct. 2456.

80 F. Supp. 2d at 1340.

Based on this reasoning, this Court determines that Brevard County's interest in prohibiting public nudity is unrelated to the suppression of free expression. The Court rejects Plaintiffs' argument that various of the exceptions in the ordinance render it content-based. *Gatena* dismissed such an argument directed at language virtually identical to the "bona fide live communication" exception set forth in § 6.b. *See* 80 F. Supp. 2d at 1335-39. Further, construing language substantially similar to § 6.b, Judge Hodges stated in *Café 207*: "The exception was clearly intended to stake out those theatrical performances involving nudity with artistic value so as to be non-obscene and within the protection of the First

Amendment." 856 F. Supp. at 649; *see also*, *Gatena*, 80 F. Supp. 2d at 1341 ("the Ordinance's incidental nudity exemption attempts to save some forms of expressive nudity which constitutionally cannot be prohibited;" discussing third *O'Brien* element). Section § 6.c — exempting nudity that cannot constitutionally be prohibited — is even less offensive. Accordingly, the third *O'Brien* element is satisfied.

4. Whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the County's interest in prohibiting public nudity.

It is doubtful that the ordinance infringes on Plaintiffs' First Amendment freedoms at all, let alone incidentally, given that (a) nude sunbathing and association are not constitutionally protected, (b) the act of appearing nude in public is not necessary to communicate Plaintiffs' objections to the ordinance, and (c) the savings provisions in § 6.b and .c exempt public nudity that cannot constitutionally be prohibited. However, assuming some incidental restriction, the specific prohibitions set forth in the ordinance are no greater than is essential to the Board's interest in banning public nudity. As recognized in *Gatena* and *Café 207*, anti-nudity ordinances can constitutionally require persons to "cover-up." *See* 80 F. Supp. 2d at 1341; 856 F. Supp. at 645-46. Concerning the extent to which specified body areas must be covered, Judge Hodges made clear that more than pasties and a g-string may constitutionally be required. *See* 856 F. Supp. at 645-46. In that regard, he observed that "the Supreme Court has been 'loath to second-guess the Government's judgment' with respect to the degree of regulation

necessary to further the government's legitimate interests." 856 F. Supp. at 646 (quoting *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 478 (1989)). The amount of clothing required by Brevard County's ordinance is not so great as to violate the Constitution. Accordingly, the ordinance satisfies *O'Brien's* fourth element.

Since Brevard County's anti-nudity ordinance passes the *O'Brien* test, the Defendants are due summary judgment on the Plaintiffs' claim that the measure violates their First Amendment right to free expression.

B. Vagueness

Plaintiffs' facial challenge[8] based on vagueness is subject to the following standards enunciated in *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318 (11th Cir. 2001):

> "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir.2000). The general rule is that for a facial challenge to a legislative enactment to succeed, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95

8. It appears doubtful from Plaintiffs' summary judgment memoranda pertaining to Defendant Brevard County (Docs. 76 & 92) that Plaintiffs are raising an "as-applied" vagueness challenge. If they are, Defendants are entitled to summary judgment on that claim, as well.

> L.Ed.2d 697 (1987). "The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *Id.* This "heavy burden" makes such an attack "the most difficult challenge to mount successfully" against an enactment. *Id.*

272 F.3d at 1329.

Plaintiffs have not met their "heavy burden" in this case. Unquestionably, there are a whole host of circumstances — including nude sunbathing — which the ordinance may validly prohibit. Hence, Plaintiffs' vagueness challenge fails.

The same result applies even if the provisions of the ordinance are subjected to more intense scrutiny.[9] Plaintiffs raise numerous arguments concerning the language of § 6.b, which exempts nudity that cannot constitutionally be prohibited "because it constitutes a part of a bona fide live communication, demonstration or performance . . . wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression[.]" However, this Court has already rejected a vagueness challenge to an exception, in another county's anti-nudity ordinance, identical to § 6.b. *See Gatena*, 80 F. Supp. 2d at 1341; *see also*, *Café 207*, 856 F. Supp. at

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9. Notwithstanding its determination that the ordinance in *Horton* was not facially vague under *Salerno*, the *Horton* panel noted that "certain inroads into *Salerno*'s rule have developed." 272 F.3d at 1330. Accordingly, the panel alternatively analyzed the specific provisions of the ordinance at issue in that case. *Id.* at 1330-31.

649-50 (rejecting vagueness challenge to virtually identical language). As Judge Hodges stated in *Café 207*, "[m]erely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague. Case-by-case adjudication is required and will satisfy the due process requirements of the Fourteenth Amendment." 856 F. Supp. at 649. Accordingly, this Court concludes that § 6.b is sufficiently definite to pass constitutional muster.

In similar fashion, Plaintiffs attack § 6.c, which exempts nudity "otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions[.]" Plaintiffs argue that the "under existing judicial decisions" language is impermissibly vague. This Court disagrees. That language is sufficiently definite to satisfy due process requirements. "Existing judicial decisions" are precisely what this Court would be required to examine in order to determine whether conduct falls within the protection of the First Amendment.

Plaintiffs' other vagueness arguments are equally meritless. Accordingly, the Court concludes that the Defendants are entitled to summary judgment on Plaintiffs' vagueness challenge.[10]

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10. To support their vagueness arguments, Plaintiffs place much emphasis on the fact that a number of deponents aligned with the Defendants evidenced confusion about the meaning of various terms of the ordinance, or interpreted those terms differently. While this may reflect the need for greater training for those tasked with enforcing the ordinance, it does not mean the ordinance is unconstitutionally vague.

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C. Overbreadth

As noted by the Court of Appeals for the Eleventh Circuit, "the Supreme Court has permitted facial challenges based on overbreadth 'where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.'" *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1331 (11th Cir. 2001) (quoting *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992)). This exception to the usual "unconstitutional-in-every-conceivable-application" rule, however, "has generally been applied only to prior restraints on speech such as before-the-fact permitting and licensing regimes." *Horton*, 272 F.3d at 1331-32. Brevard County's anti-nudity ordinance does not qualify as a permitting or licensing scheme (or otherwise require prior review); rather, the ordinance calls for after-the-fact enforcement. Accordingly, the Plaintiffs' overbreadth challenge does not qualify for the exception to the general rule. *See id.* at 1332.

Even if the exception could validly be applied, the outcome is the same. For a law to be considered facially invalid, it must be "'substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases.'" *Id.* (quoting *Ward v. County of Orange*, 217 F.3d 1350,1355, *reh'g and sugg. for reh'g en banc denied*, 234 F.3d 35 (11th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001)). Invalidating a law based on facial overbreadth "is not, however, a common judicial remedy;" as "strong medicine,"

the doctrine is applied "sparingly and only as a last resort." *Horton*, 272 F.3d at 1332 (citations and quotations omitted).

Applying similar principles in *Café 207*, Judge Hodges rejected an overbreadth challenge to St. Johns County's substantially similar ordinance. Focusing primarily on the question of standing,[11] Judge Hodges determined that even if the St. Johns ordinance was broad enough to encompass protected expression, the ordinance's exemptions would "step in to safeguard the protected speech." 856 F. Supp. at 648. Substantially similar exemptions are included in Brevard County's ordinance. *See* § 6.b & .c. Judge Hodges also noted that the legislative findings set forth in the St. Johns ordinance, clarifying that the measure was not intended to prohibit constitutionally-protected conduct, provided interpretive guidance. *Id.* Similar findings are present in Brevard County's ordinance. *See* § 3.u & .v. Judge Hodges concluded that "in light of the . . . exemptions and judging the ordinance as a whole . . . , there is no real and substantial overbreadth in the measure that cannot await case-by-case limiting construction or, if necessary, partial invalidation."[12] 856 F. Supp. at 649 (footnote omitted).

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11. Judge Hodges determined that the plaintiffs in *Café 207* lacked standing to raise an overbreadth challenge. 856 F. Supp. at 649.

12. Judge Hodges also noted that the St. Johns ordinance contained a severability clause which would "preserv[e] the main thrust of the ordinance in the event of partial invalidity[.]" 856 F. Supp. at 649 n.7. The Brevard County ordinance contains a similar severability provision. *See* § 8.

Application of these principles is fatal to Plaintiffs' overbreadth claim. When judged in relation to the ordinance's "plainly legitimate sweep," protected expression inhibited by the ordinance is insubstantial, and can be remedied "independent of a facial challenge" on a case-by-case basis. *Horton*, 272 F.3d at 1332-33. Accordingly, the Defendants are entitled to summary judgment on Plaintiffs' overbreadth claim.

D. Equal Protection

Plaintiffs contend that by enforcing the ordinance against naturists, but not against commercial adult entertainers, the Sheriff violates the Plaintiffs' right to equal protection. The Court rejects this argument, as well.

Brevard County has chosen to enact a separate ordinance governing adult entertainment establishments, including those in which nude dancers perform. The adult entertainment ordinance is comprehensive. It does not merely regulate nudity in "strip clubs." Rather, it addresses a host of additional subjects associated with a variety of adult entertainment establishments, including sexual activities, licensing, location, advertising, and the admission of, and sales to, minors. *See* Attachment "ORD" to Doc. 45.

The Sheriff has identified factors associated with adult entertainment establishments that distinguish them from more public places, so as to demonstrate that commercial nude dancers and naturists are not similarly-situated. In that regard, the Sheriff states:

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> [D]istinguishing characteristics exist that separate private night clubs from a public beach or any other public location including, but not limited to: (a) paying to enter a club vs. free unlimited access to the beach or other public place; (b) the expectation of witnessing nudity at a strip club vs. the surprise of seeing nudity at a public place; (c) the prohibition of minors at a strip club vs. their presence at public places; (d) the obstruction of activity that occurs within the strip clubs (as there are no windows) vs. the exposed activity that occurs at a public place; and (e) the licensing and zoning restrictions applied to strip clubs that do not apply to public places. Put simply, strippers and the plaintiffs are not "similarly situated people."
>
> To illustrate this point, if adult entertainment performers venture outside of their working environment and decide to appear nude at the beach or any other public place in Brevard County, they will be subject to the Ordinance just like everyone else. Conversely, if one of the plaintiffs were to be employed as an adult entertainer in one of the aforementioned establishments, they would not be subject to the Ordinance based on the above referenced reasons. This does not prove that the BCSO doesn't enforce the Ordinance elsewhere in the County, but rather demonstrates that the primary enforcement area is the area where most public nudity and complaints of public nudity occur.

Doc. 98 at 9 (deposition and case citations omitted).

The Court finds these distinctions compelling. It is important to remember that unlike garden-variety public nudity, nude dancing "is expressive conduct that falls within the outer ambit of the First Amendment's protection." *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Ga.*, 242 F.3d 976, 982 (11th Cir. 2001). Accordingly, the Court rejects Plaintiffs' argument that naturists and commercial nude entertainers are similarly situated. The Court also rejects Plaintiffs' contention that the Sheriffs "unequal enforcement of the Ordinance regarding strip joints vis-a-vis naturists is arbitrary, capricious, and without rational basis." Doc. 73 at 7. The fact that the Sheriff polices exotic dancers through the mechanism of Brevard County's ordinance dedicated to the regulation of adult entertainment, instead of arresting them under the more general anti-nudity ordinance, does not deprive the Plaintiffs of equal protection. In other words, that the Sheriff's deputies enter an adult entertainment establishment with an eye toward enforcing the adult entertainment code, rather than the anti-nudity ordinance, is of no constitutional moment. The unique factors associated with adult entertainment establishments justify regulation of those businesses by means of a separate ordinance. Plaintiffs have not cited any case law addressing the propriety of a dual ordinance scheme such as here presented; instead, they rely on general equal protection precepts. In the absence of authority to the contrary, this Court is unwilling to essentially invalidate the anti-nudity ordinance on the sole basis that it is not enforced against commercial nude dancers who are comprehensively regulated under a separate ordinance. Brevard County has legitimate governmental interests in regulating public nudity and adult entertainment establishments, and the Sheriff has the

obligation to enforce the County's ordinances unless they are "grossly and flagrantly unconstitutional." *Cuesta v. School Bd. of Miami Dade County, Fla.*, 285 F.3d 962, 967 n.5 (11th Cir. 2002) (quoting *Michigan v. DiFillippo*, 443 U.S. 31, 38 (1979)). Brevard County's anti-nudity ordinance is not "grossly and flagrantly unconstitutional;" to the contrary, this Court today determines that it is constitutional. Accordingly, the Sheriff is entitled to summary judgment on Plaintiffs' equal protection claim.[13]

E. Freedom of Religion

Facially, Brevard County's anti-nudity ordinance prohibits public nudity, not religious expression. Nevertheless, Plaintiffs claim that the ordinance's prohibition on nudity in public places, including a "meeting facility utilized by a religious . . . organization," § 4.e., violates their right to free religious exercise. Once again, Plaintiffs rely on general First Amendment principles; they identify no legal authority dealing with nudity in the context of religious practices. Put bluntly, this claim verges on the frivolous. It illustrates the lengths to which Plaintiffs will go in their attempt to invalidate the ordinance.[14]

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13. Given this ruling, it is unnecessary to reach the issues of custom and policy, deliberate indifference and res judicata.

14. Any doubt about whether Plaintiffs and their counsel have lost perspective concerning this case is dispelled by examining the "damages claimed" section of the final pretrial statement. Therein, Marvin Frandsen seeks pain and suffering damages, "[s]ubject to jury determination," resulting from an automobile accident he was

(Cont'd)

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It is doubtful that the Plaintiffs even have standing to raise this claim. If they do, they have produced no evidence that any traditional religious organization has actually been deterred from performing any ceremony involving nudity in Brevard County.[15] In a vain attempt to surmount this obstacle, Plaintiffs resort to the Universal Life Church ("ULC").

(Cont'd)

in "while en route to the Titusville law library to research issues surrounding the nudity ordinance." Doc. 121, §VII at 8. Similarly, playwright Tonianne Wyner claims the following "future costs" as damages:

> Plaintiff will have to regain an audience previously "chilled." The effort will take time, money and work. To expedite that effort Plaintiff Wyner would place TV, radio and print ads all over Florida since the audience she acquired traveled from all parts of Florida and beyond. *The total approximate cost would be around $202,513.88. This is calculated on: 6 major newspapers @ $28, 678.98 each (1/4 page ad for 2 weeks); and 6 major TV stations @ $2,999.00 each (2 weeks of multiple 30 second ads); and 25 radio stations @ $500 each.*

Id. at 19 (emphasis supplied). These claimed damages are nothing short of ridiculous. Plaintiffs' counsel are admonished for including these damages elements in the pretrial statement.

15. Dr. Frandsen opined during his deposition that a particular religious ceremony conducted in a Mormon temple might run afoul of the ordinance. *See* Doc. 49 at 107-108. He identified the ceremony as "washing and anointing." Frandsen indicated that although the participant wears a garment loosely covering the participant's front and back, spectators might be able to see the participant's genitals from the side. However, Frandsen testified that this ceremony is performed in a Mormon temple, and there is no temple in Brevard County. *See id.* at 109.

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Plaintiffs Frank Cervasio and Tonianne Wyner are ministers in the ULC; Marianne Cervasio and Marvin Frandsen are members of that organization. Apparently, one can become a ULC minister "for life" in "just 10 minutes" over the Internet. *See* Exhibit "G" to Doe. 57.[16] The ULC's doctrinal "requirements" are as follows:

> We believe you, we believe in you, we accept you — we offer our hand to you to share respect, wealth, power and influence in the world through the power of God as you believe — your beliefs count in the ULC — *we ask only that you promote the freedom of religion and do that which is right and it is up to the individual to determine what is right as long as it does not infringe on the rights of others and is within the law.* That is as close to the Golden Rule as one can come without being the Golden Rule.

Id. (emphasis supplied).

No evidence has been presented that the ULC requires or even encourages that a religious ceremony be performed in the nude. Frank Cervasio testified at his deposition that

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16. The ULC's website offers a "*Ministry in a Box* product that includes everything you need to start your ministry[.]" Exhibit "G" to Doc. 57. Among the advantages of becoming a ULC minister: "Did you know that many companies offer discounts to ministers, ministers have a longer life expectancy for insurance carriers, insurance rates are often lower, if you ask - benefits can be yours just for the asking and the showing of your ministerial wallet ID or wall credential." *Id.*

he was not aware of any ULC "teaching" that requires nudity. Doc. 47 at 87. When asked if he recalled "ever reading anything from the Universal Life Church or hearing anything from anyone at the Universal Life Church that would require a particular service or ceremony to be performed in the nude," Frank Cervasio replied: "Not that I recall, no." *Id.*

In a subsequently-filed affidavit, Frank Cervasio states that the ULC has "two main tenets": "the absolute right to freedom of religion" and "to do that which is right," as well as a "corollary tenet . . . not to violate the law." Doc. 95, ¶ 2, at 1. However, he says, the ULC "leaves the modes and methods of religious observance to the discretion of its ministers and practitioners." *Id.* at 1-2. Frank Cervasio further states:

> As part of my ministry, I perform marriages and other religious ceremonies in which I and the participants are in the nude. In my sincere belief, the best and preferred way to exercise my religion is to do so in the nude. In my view, performing and encouraging participating in marriage and other ceremonies in the nude is an important religious practice, and a fundamental rite, which is essential, basic and integral to my role, function, and service as a minister.

Id., ¶ 3, at 2. Frank Cervasio also states that his "fear of further arrest of myself and of my congregation under the Ordinance interferes with the way I would normally conduct my ceremonies." *Id.*, ¶ 5, at 2.

Assuming that the Universal Life Church qualifies as a religion for First Amendment purposes, this Court is unwilling to invalidate Brevard County's anti-nudity ordinance based on the Plaintiffs' personal belief that nudity is "the best and preferred way" to practice that religion. Given the ULC's extremely broad and vague doctrinal "requirements," one could argue that virtually anything qualifies as an aspect of that religion. If this were true, each ULC member would have the ability to elevate his or her personal belief structure into a "religion" within the meaning of the First Amendment. This Court will not countenance such an absurd result. Legitimizing such a concept could cripple the government's ability to administer activities traditionally subject to government regulation, e.g., taxation, zoning, public health and criminal law. Moreover, it appears that the Plaintiffs' position, that nude religious practices are authorized by the ULC, is directly contrary to the ULC's requirement that its members not violate the law. Finally, even if § 5 of the ordinance does encompass nudity during the performance of some religious ceremony protected by the First Amendment, such nudity would be exempted from prosecution under the exceptions contained in § 6.b. & .c. Accordingly, the Defendants are entitled to summary judgment on Plaintiffs' freedom of religion claim.

VI. CONCLUSION

At bottom, the Plaintiffs' feud with the Defendants over Brevard County's anti-nudity ordinance is a political problem, rather than a matter of constitutional concern. Through its duly-elected commissioners, the County has chosen to ban public nudity unprotected by the Constitution.

If Plaintiffs wish to reverse that course, they must resort to the political process. If they are unsuccessful, they may have to face the realization that under our form of government, so long as the Constitution is not violated, the desires of the minority sometimes must bend to the will of the majority.

Based on the foregoing, it is ORDERED as follows:

1. Sheriff Williams' Motion for Summary Judgment (Doc. 45), filed January 4, 2002, is GRANTED.

2. Brevard County's Motion for Summary Judgment (Doc. 57), filed January 4, 2002, is GRANTED.

3. Plaintiffs' Dispositive Motion for Partial Summary Judgment Against Sheriff Williams (Doc. 72), filed January 8, 2002, is DENIED.

4. Plaintiffs' Dispositive Motion for Partial Summary Judgment Against Brevard County (Doc. 75), filed January 8, 2002, is DENIED.

5. The Defendants' motions to strike (Docs. 65, 66, 67, 68, 69 & 97) various "expert" witnesses listed by Plaintiffs and their reports are DENIED. Given the foregoing rulings, particularly concerning Plaintiffs' challenges to the findings underpinning the ordinance, the Court has not considered for summary judgment purposes the evidence addressed in these motions. Nevertheless, these materials will not be stricken; they will remain in the court file for purposes of appellate review, if necessary. The Court does not reach the question of whether the Plaintiffs' witnesses qualify as

experts or whether their opinions are reliable. *See* Fed. R. Evid. 702.

6. Brevard County's Motion to Strike Plaintiffs' Polling Data (Doc. 99), filed February 5, 2002, is DENIED. Again, the Court has not considered the polling data in light of its rulings concerning the findings underlying the ordinance. However, this evidence, too, should remain in the record. The Court does not reach the question of whether the polling data is scientific and reliable.

7. The Defendants' Motion to Strike Plaintiffs' Statement of Facts, etc. and Memorandum of Law, etc. (Doc. 101), filed February 5, 2002, is DENIED.

8. Plaintiffs' Unopposed Motion to File Amended Defendants' Exhibit Lists (Doc. 123), filed April 4, 2002, is moot.

9. As Plaintiffs note, the Defendants filed a number of motions without complying with Local Rule 3.01(g). The Defendants attempted to remedy that lapse by filing a certificate of compliance with Rule 3.01 (g) long after the Plaintiffs pointed out the problem. *See* Doc. 112. However, the Local Rule requires that the conference of counsel occur prior to motion filing, and that the certificate of attorney conference accompany the motion. In the future, Defendants' counsel shall comply with these requirements.

10. The Clerk shall enter a final judgment providing that the Plaintiffs, Marvin V. Frandsen, Jan L. Frandsen, Bryan Morris, Frank J. Cervasio, Marianne Cervasio, Dian Hardison

and Tonianne Wyner, shall take nothing on their claims against the Defendants, Brevard County, Florida, and Brevard County Sheriff Phil Williams, and further providing that the Defendants shall recover their costs of action.

11. The Clerk shall close this case.

DONE and **ORDERED** in Orlando, Florida this 3rd day of May, 2002.

s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED OCTOBER 30, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-13293-HH

MARVIN V. FRANDSEN,
JAN L. FRANDSEN,
BRYAN MORRIS,
FRANK J. CERVASIO,
MARIANNE CERVASIO,
DIAN HARDISON,
TONIANNE WYNER,

Plaintiffs-Appellants

versus

BREVARD COUNTY, FLORIDA,
PHIL WILLIAMS,
Brevard County Sheriff,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

Appendix C

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __F.2d __).

Before: EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
CHIEF JUDGE

APPENDIX D — BREVARD COUNTY ORDINANCE 95-21

BREVARD COUNTY ORDINANCE 95-21

AN ORDINANCE PROHIBITING PUBLIC NUDITY IN BREVARD COUNTY, FLORIDA; DESIGNATING A TITLE; EXPRESSING THE INTENT; SETTING FORTH FINDINGS; PROVIDING DEFINITIONS; CREATING EXEMPTIONS; PROVIDING FOR AN AREA EMBRACED; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA:

Section 1. *Title.* This ordinance shall be known as the "Brevard County Public Nudity Ordinance."

Section 2. *Intent.* It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Appendix D

Section 3. *Findings.*

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So.2d 1155,1156, n.3 [Fla. 1977]; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area #13), which has historically been frequented by nude sunbathers, and

e efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches v. City of Miami]; and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart for nudity has been found, by other communities in Florida, to have generally increased incidents of

prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

m. Brevard County is a family oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular playalinda beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety, and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the United States Constitution and Florida

Constitution, the act of being nude to non-public places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the Brevard County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order

and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v. Glen Theatre. Inc. 111 S.Ct 2456,115 L.Ed.2d 504 (1991); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. *Definitions*.

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose,

1) the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement

includes, but is not limited to, G-Strings, T-Back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernably turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) Years of age.

d "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended or sleeping accommodations; or at the enclosed or

isolated location of a bona fide private club whose membership as a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public Place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by

a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. *Public Nudity*. Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or

b. cause or permit another person to appear nude in a public place; or

c. sunbathe nude in a public place; or

d. appear nude in a public place in such a manner as to be in violation of §877.03, Florida Statutes; or

e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by §775.01, Florida Statutes.

Section 6. *Exemptions*. The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:

a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed

within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc __ U.S. 111 S.Ct. 2456,115 L.Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So. 2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or

d. where a person appears nude in any area which has been designated, by the Federal or State government as a public place provided or set apart for nudity; or

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State

government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. *Violation of Section 5/Penalty.* Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1) Florida Statutes.

Section 8. *Severability.* If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate purpose and intent of this ordinance.

Section 9. *Area Embraced.* This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Section 10. *Effective Date.* This ordinance shall take effect upon the date of receipt of official acknowledgement from the office of the Secretary of State of the State of Florida, that said ordinance has been filed with that office.

Appendix D

DONE, ORDERED AND ADOPTED in Regular Session, this *18th* day of *May*, 1995.

ATTEST: BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA